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# IN THE
# COURT OF APPEALS OF INDIANA

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| DESMON CATLETT, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 82A01-0607-CR-313 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Robert J. Pigman, Judge
Cause No. 82D02-0504-MR-276

**March 13, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**DARDEN, Judge**

## STATEMENT OF THE CASE

Desmon Catlett appeals his convictions of and sentences for voluntary manslaughter, a class A felony, and possession of a firearm by a serious violent felon, a class B felony.

We affirm.

## ISSUES

1. Whether the trial court abused its discretion when it admitted
   - photographs of medical personnel attempting to treat the deceased victim;
   - certain autopsy photographs; or
   - testimony by a witness regarding his observations of Catlett's person two days after the shooting.

2. Whether Catlett's convictions of and sentences for voluntary manslaughter and possession of a firearm by a serious violent felon violate constitutional prohibitions against double jeopardy.

## FACTS

In January of 2005, Catlett began dating Regina Hardiman. Hardiman had two sons: 14 year-old Te. J., and 12 year-old Tr. S. In early March of 2005, Catlett and Hardiman ended their dating relationship, and Hardiman began dating Tommy Jones, who was Te. J.'s father. On April 2, 2005, Jones drove Te. J. and Tr. S. from Hardiman's house to baseball practice. Later that afternoon, Jones returned – with his 13 year-old daughter D.S. in the car – to pick up the boys. On the way to Hardiman's house, Jones saw Catlett in a vehicle; he honked at the vehicle, then turned around and followed it into the parking lot of an apartment complex. It was approximately 5:00 p.m.

Jones parked next to the vehicle, exited his own, and approached the passenger side of the other vehicle – where Catlett was sitting. According to D.S., Jones and Catlett "had words," and it "sounded like [Jones] was angry." (Tr. 328). Catlett extended his hand, but Jones refused to shake it. Jones struck Catlett and then tried to pull him out of the car. Te. J. went over and "tried to stop" Jones. (Tr. 338). Te. J. saw that Catlett had a gun and then heard a gunshot. Jones ran around the back of the vehicles, yelling to Te. J., Tr. S., and D.S. "to get down." (Tr. 284). Catlett ran after him, firing a second shot. Jones ran between two apartment buildings. Catlett followed, firing a third shot. The children heard the shots and saw Jones fall to the ground. Catlett walked back toward them. D. S. asked if her father was dead, and Catlett "said, 'I don't know.'" (Tr. 333). Catlett walked toward Te. J. and Tr. S., "waving the gun" around, and then ran away. *Id.*

An apartment resident called 9-1-1; both police and fire department personnel were on the scene within minutes. A fire department paramedic attempted to treat Jones, despite being unable to detect any pulse or respiration by Jones.

On April 4, 2005, the State filed an information charging Catlett with murder and possession of a firearm by a serious violent felon, a class B felony. Catlett was tried by jury on April 24 – 26, 2006. Te. J., Tr. S. and D.S. testified to the above facts, and apartment residents testified to having seen Jones running from Catlett. Defense counsel pressed a self-defense theory, raising the possibility of continued aggression by Jones after the first shot. Police and fire department witnesses testified about their actions upon arrival at the scene. Photographs of Jones' body, taken at the scene and during the autopsy examination, were admitted. Forensic pathologist Mark LeVaughn testified that

Jones died of multiple gunshot wounds, with the "fatal wound being a close range wound to the back of the head." (Tr. 315). LeVaughn testified that although he had not personally observed Jones' body, his opinions as to those injuries were based upon his review of the autopsy photographs of Jones' body and the report of the examining pathologist, which report was also admitted into evidence. In addition, photographs of Catlett's face and body, taken April 4, 2005 (two days after the shooting), were admitted into evidence. Officer Ben Gentry testified that he was present when these photographs of Catlett were taken and that he saw no "outward visible signs of injury" on Catlett, no bruising, swelling, or injuries to Catlett's knuckles, back or chest, and only a "couple of minor scratches" on his legs. (Tr. 187, 188).

Catlett testified that Jones had expressed anger about Catlett "seeing his kids" and had threatened him. (Tr. 476). Catlett testified that to protect himself, he had bought a handgun. Catlett further testified that Jones attacked him in the passenger seat of the vehicle -- striking him with his closed fist in the jaw and repeatedly hitting his head; Jones said that "he was going to kill [Catlett]; that when Jones "had a hold of [his] leg, Catlett picked up his handgun; after which Jones pulled him from the vehicle by his foot. (Tr. 484, 485). Catlett testified that his head hit the pavement, and that he had no memory of anything occurring from that point until more than four hours later, when he arrived at his parents' home. Dr. Eric Cure, an emergency room physician, testified that he examined Catlett on April 8, 2005, and found that Catlett had a fractured left jaw, swelling of the left parietal scalp, and faint bruising.

The jury found Catlett guilty of voluntary manslaughter, a class A felony. Catlett then waived jury trial on the second charge, and the trial court found him guilty of the unlawful possession of a firearm by a serious violent felon, a class B felony. On June 19, 2006, the sentencing hearing was conducted. The trial court found as aggravating circumstances Catlett's criminal history, including "robbery . . . not only a felony conviction but . . . a crime of violence", and convictions for both marijuana and OMVI; that Catlett had violated a previous placement in community corrections and been required to serve balance of that sentence in jail; and "that there were young children present at the time of the shooting." (Tr. 615). It found "a mitigating circumstance" to be that Catlett was "not the initial aggressor on that day." (Tr. 616). The trial court then sentenced Catlett to thirty-five years for voluntary manslaughter, five years above the advisory sentence for the class A felony offense. For the possession of a firearm by a serious violent felon offense, the trial court sentenced Catlett to ten years, the advisory term for a class B felony offense. The trial court ordered that the sentences be served consecutively "because of the prior act of violence that has not deterred your conduct." (Tr. 617).

## DECISION

1. Admission of Evidence

The trial court has inherent discretionary power on the admission of evidence. *McManus v. State*, 814 N.E.2d 253, 264 (Ind. 2004), *cert. denied*. The trial court's decisions in this regard are reviewed only for an abuse of that discretion. *Id.*[1]

a. Photographs of Medical Personnel at the Scene

Catlett argues that the trial court erred when it admitted four photographs showing medical personnel at the scene rendering assistance to Jones. At trial, Catlett objected that the photographs were "not relevant" and offered no "probative value . . . as to the ultimate issue." (Tr. 173). On appeal, he asserts that these photographs were not relevant because there was "no dispute as to the fact that medical assistance was at the scene and performed medical procedures." Catlett's Br. 10. Therefore, he concludes, the admission of the photographs constituted reversible error. We cannot agree.

According to Indiana Evidence Rule 401, "relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Photographs depicting the crime scene are admissible as long as they are relevant and competent aids to the jury, and their probative value is not substantially outweighed by the danger of unfair prejudice. *Lee v. State*, 735 N.E.2d 1169, 1172 (Ind. 2000).

The four photographs of medical personal treating Jones depict his body in a grassy area next to a concrete patio outside the glass door of an apartment. Officer

[1] We remind Catlett's counsel that an appellant's brief "must include for each issue a concise statement of the applicable standard of review." Ind. Appellate Rule 46(A)(8)(b).

Gentry testified that he took the photograph, and that it accurately depicted that scene. Occupants of the apartment testified to having seen Jones fall there. Various witnesses testified with reference to a large diagram portraying the area of the parked vehicles, the parking lot, and the apartment complex -- connecting their testimony concerning actions by Jones and Catlett and the timing of the gunshots to locations. Dr. LeVaughn testified that the fatal gunshot wound to the back of Jones' head would have felled him upon impact. Given the self-defense theory argued at trial, evidence of where Jones fell was relevant to the jury's determination on that defense. Also, the photographs depicted matters described by several witnesses. Further, we do not find that the photographs pose a danger of unfair prejudice that outweighs their probative value. Therefore, we do not find that the trial court abused its discretion when it admitted the four photographs of Jones being treated by medical personnel at the scene.

b. Autopsy Photographs

Next, Catlett argues that the trial court abused its discretion when it admitted "six autopsy photographs." Catlett's Br. 12. Catlett contends that the photographs were "unnecessarily gruesome";[2] admission of "all six" constituted cumulative evidence; and that the photographs unfairly prejudiced him because "the cause of Jones' death was not a contested issue in the case." *Id.* Again we cannot agree.

Although Catlett repeatedly refers to six autopsy photographs, he identifies them as Exhibits 15, 16, 18, and 19-22, *i.e.*, seven photographs. Exhibit 15 depicts Jones'

[2] The State asserts that Catlett made no such objection at trial. Catlett's brief does not persuade us to the contrary. Catlett simply contends that he made timely objections to the various evidence that he argues was erroneously admitted; he never directs us to any such objections.

upper left arm and shoulder area. Dr. LeVaughn testified that the darkened area was "a bullet entry wound." (Tr. 369). Exhibit 16 is a photograph depicting Jones' right arm with what Dr. Vaughn testified was a "plastic rod . . . inserted through the wound tract" to indicate "the path or direction of the bullet through the tissue." (Tr. 366). Exhibit 18 is a photograph of the same area but taken "a little bit closer." *Id.* The injuries shown by Exhibits 15, 16, and 18, combined with holes in the jacket worn by Jones at the time of his death (which jacket had also been admitted into evidence) led Dr. Vaughn to testify as to the likely defensive positions of Jones' arms when struck by the bullets. Exhibit 19 and Exhibit 20 are close-up photographs of the backs of Jones' right and left hands. Dr. LeVaughn testified that he saw no evidence of injuries to the backs of Jones' hands. Exhibit 21 and Exhibit 22 are close-up photographs depicting the bullet entry wound at the back of Jones' head. As Dr. LeVaughn explained, the hair was shaved to display "small little injuries on the skin . . . called stippling or powder burns" caused by "gun powder coming out of the barrel" of a gun "as little projectiles" that "cause injuries to the skin." (Tr. 371). Thus, according to Dr. LeVaughn, the photographs "indicate[] that this was a close range gunshot wound." (Tr. 372). Combined with testimony by Dr. LeVaughn explaining the import of what the photographs depicted, all of these photographs were relevant to the jury's determination of whether Catlett had a valid claim of self-defense. None of the above photographs are gruesome; only the photographs of entry wounds show a very slight amount of blood. Exhibits 16 and 18 are similar, as are Exhibits 21 and 22, differing only on the distance of the body part from the camera. However, we do not find this fact to be unduly prejudicial, as admission of

cumulative evidence alone is insufficient to warrant a new trial. *See Helsley v. State*, 809 N.E.2d 292, 296 (Ind. 2004).

Unlike the foregoing photographs, Exhibit 24 is somewhat gruesome. It depicts Jones' brain, and the trial court withheld admission of this photograph until Dr. Vaughn testified. After the doctor testified about the other photographs, he testified that Exhibit 24 showed Jones' brain "viewed from" above, with a

> plastic rod through the brain tissue which depicts the bullet wound path which is basically from the back of the left area of the brain, in the occipital lobe and then the bullet passed through the left and right sides of the brain and exited . . . the brain, not the skull but exited the brain on the right frontal lobe.

(Tr. 374). The State then moved to admit Exhibit 24 to "show the injury to Tommy Jones' brain and the route that the bullet traveled through his brain." *Id.* Defense counsel objected that the "probative value" did not "outweigh[] the significance of what" Exhibit 24 "depict[ed]." (Tr. 374).

Gruesome photographs with strong probative value are admissible where they help interpret the facts of the case for the jury. *Helsley*, 809 N.E.2d at 296. As already noted, Catlett's counsel argued that his fatal shooting of Jones was in self-defense. The depiction by Exhibit 24 of the route traveled by the fatal bullet as it entered Jones' brain from the back of his head and traveled from the left to the right as it moved through the brain was evidence that could assist the jury in its consideration of Catlett's self-defense claim. Therefore, we find that the trial court did not abuse its discretion when it admitted Exhibit 24.

c. Testimony

Finally, Catlett argues that the trial court abused its discretion when it allowed Officer Gentry to testify about his observations of Catlett's appearance two days after the shooting. Catlett claims that such testimony was inadmissible because Gentry was not qualified as either an "expert" or a "skilled witness" on injuries; and that by viewing the photographs of him, the jury "was in just as good a position as Officer Gentry to determine whether" Catlett bore any injuries. Catlett's Br. 14. We are not persuaded.

As the State correctly responds, Gentry did not offer an opinion as to whether Catlett was injured; he simply testified that he had observed no injuries on Catlett at the time the photographs of his body were taken two days after the shooting. As to Catlett's claim that testimony by Gentry concerning his observations should not have been admitted because the jury could make its own observation based on the photographs, we presume that the jury was properly instructed about its role in weighing evidence.[3] Therefore, we find no error here.

2. Double Jeopardy

Catlett argues that his "rights under the state and federal constitutions barring double jeopardy" were violated. Catlett's Br. 16. Specifically, he argues the violation of those rights because (1) the trial court used his previous robbery conviction as the basis for imposing an enhanced sentence for voluntary manslaughter that was five years more than the advisory sentence; (2) that same robbery conviction was the underlying felony which was used to support his conviction for possession of a firearm by a serious violent

[3] Catlett's Appendix does not contain the trial court's instructions to the jury.

felon; (3) his use of the handgun was what elevated the manslaughter offense from a class B felony to a class A felony; and (4) his possession of the "same handgun" was the basis for his conviction of the class B felony offense of possession of a firearm by a serious violent felon. However, Catlett provides no developed argument and authority for any one, or any combination, of the foregoing facts as constituting a violation of double jeopardy as a matter of law.

As stated in FACTS, for his conviction on voluntary manslaughter, the trial court imposed a sentence five years greater than the advisory sentence because it found several aggravating circumstances – Catlett's criminal history, which it expressly cited as including two other offenses in addition to the robbery conviction; his violation of a previous community corrections placement; and that the offense was committed in the presence of young children.[4] Hence, that he was ordered to serve a term greater than the advisory sentence was not based on the single aggravating circumstance of his having previously been convicted of robbery.

The U.S. Constitution forbids any person being "twice put in jeopardy" for "the same offense." U.S. CONST. amend. V. The test to determine whether there are two offenses so as to violate the double jeopardy clause of the U.S. Constitution is whether each of the two statutory provisions defining the respective offenses "requires proof of an additional fact which the other does not." *Games v. State*, 684 N.E.2d 466, 475 (Ind. 1997) (quoting *Blockburger v. United States*, 284 U.S. 299, 204 (1932)). The offense of

[4] The trial court is authorized to consider as an aggravating circumstance that the person knowingly committed a crime of violence "in the presence or within the hearing of an individual who was less than eighteen (18) years of age at the time the person committed the offense." I.C. § 35-38-1-7.1(a).

voluntary manslaughter requires proof that the defendant intentionally killed another person, *see* Ind. Code § 35-42-1-3, but not that the defendant had committed a previous serious violent felony. *See* I.C. § 35-47-4-5. The offense of possession of a firearm by a serious violent felon requires proof that the defendant had committed a previous serious violent felony, *see id.*, but not proof that the defendant had intentionally killed another person. I.C. § 35-42-1-3. Therefore, Catlett's convictions for both involuntary manslaughter and for possession of a firearm by a serious violent felon do not violate the double jeopardy provision of the U.S. Constitution.

Indiana's Constitution also forbids putting any person "in jeopardy twice for the same offense." IND. CONST. art. 1, § 14. Under the actual evidence test, the double jeopardy provision of the Indiana Constitution is violated if the defendant establishes "a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense." *Richardson v. State*, 771 N.E.2d 32, 53 (Ind. 1999). However, there is no violation of Indiana's double jeopardy clause under this actual evidence test "when the evidentiary facts establishing the essential elements of one offense also establish one or even several, but not all, of the essential elements of a second offense." *Spivey v. State*, 761 N.E.2d 831, 833 (Ind. 2002).

The elements of voluntary manslaughter are that the defendant (1) knowingly or intentionally killed another person, and (2) committed that killing "by means of a deadly weapon." I.C. § 35-42-1-3. An "essential element" of the offense of possession of a firearm by a serious violent felon is the defendant's status of having previously been

convicted of an offense defined by statute as a serious violent felony. *Bayes v. State*, 779 N.E.2d 77, 83 n.4 (Ind. Ct. App. 2002). Thus, proof that Catlett committed the offense of voluntary manslaughter would not establish all of the essential elements of the offense of possession of a firearm by a serious violent felon. Therefore, there was no violation of Indiana's double jeopardy provision.

Affirmed.

BAKER, J., and ROBB, J., concur.